

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3 UNITED STATES OF AMERICA,) CRIMINAL NO. 01-00094HG

4 Plaintiff,)

5 vs.)

6 JON KEVIN MORRIS,)

7 Defendant.)

8 _____)
9 UNITED STATES OF AMERICA,) CRIMINAL NO. 01-00132SOM

10 Plaintiff,)

11 vs.)

12 (01) KIL SOO LEE,)

13 Defendant.)

14 _____)
15 UNITED STATES OF AMERICA,) CRIMINAL NO. 02-00062ACK

16 Plaintiff,)

17 vs.)

18 THOMAS MITCHELL SCHNEPPER,)

19 Defendant.)

20 _____)
21 UNITED STATES OF AMERICA,) CRIMINAL NO. 02-00273HG

22 Plaintiff,)

23 vs.)

24 (02) DANIELLE ISHIMURA,)

25 Defendant.)
_____)

1 TRANSCRIPT OF PROCEEDINGS

2 The above-entitled matter came on for hearing on
3 Thursday, December 18, 2003, at 10:10 a.m., at Honolulu, HI

4 BEFORE: THE HONORABLE HELEN GILLMOR
5 THE HONORABLE SUSAN OKI MOLLWAY
6 THE HONORABLE ALAN C. KAY
United States District Judges

7 REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

8 APPEARANCES: CRAIG G. NAKAMURA, ESQ.
9 MICHAEL ROTKEY, ESQ.
U.S. Attorney's Office
10 300 Ala Moana Boulevard, Suite 6100
Honolulu, Hawaii 96813

11 Attorneys for the Government

12 PETER C. WOLFF, JR., ESQ.
300 Ala Moana Boulevard, Suite 7102
13 Honolulu, Hawaii 96813

14 Attorney for Defendant
Jon Kevin Morris

15 EARLE A. PARTINGTON, ESQ.
16 1001 Bishop Street, Suite 1330
Honolulu, Hawaii 96813

17 Attorney for Defendant
18 Kill Soo Lee

19 PAMELA O'LEARY TOWER, ESQ.
20 1001 Bishop Street, Suite 1330
Honolulu, Hawaii 96813

21 Attorney for Defendant
Thomas Schnepfer

22 PAMELA BYRNE, ESQ.
23 300 Ala Moana Boulevard, Suite 7102
Honolulu, Hawaii 96813

24 Attorney for Defendant
25 Danielle Ishimura

1 THURSDAY, DECEMBER 18, 2003 10:10 A.M.

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3 THE CLERK: Criminal Number 01-94, the United States
4 of America versus Jon Kevin Morris.

5 Criminal Number 01-132, the United States of America
6 versus Kill Soo Lee.

7 Criminal Number 02-62, the United States of America
8 versus Thomas Mitchell Schnepfer.

9 And, Criminal Number 02-273, the United States of
10 America versus Danielle Ishimura.

11 These cases are called for hearing on motion to
12 impose sentence without reference to the sentencing guidelines
13 because the guidelines have been rendered unconstitutional by
14 the Protect Act.

15 MR. ROTKEY: Good morning, Your Honor.

16 Michael Rotkey for the United States in all four
17 cases.

18 JUDGE GILLMOR: Good morning. I see Mr. Nakamura is
19 with us, as well.

20 MR. ROTKEY: Yes, he is.

21 MR. NAKAMURA: Good morning, Your Honor.

22 MR. WOLFF: Good morning.

23 Peter Wolff appearing on behalf of Jon Kevin Morris
24 in 01-94. Your Honor, Mr. Morris is present, but he is in the
25 audience.

1 JUDGE GILLMOR: Good morning.

2 MR. PARTINGTON: Good morning, Your Honor.

3 Earle Partington for defendant Kill Soo Lee, who is
4 present in custody with the Korean interpreter.

5 JUDGE GILLMOR: Good morning.

6 THE INTERPRETER: Good morning.

7 MS. TOWER: Good morning, Your Honor.

8 Pamela O'Leary Tower standing in for Richard Kawana,
9 on behalf of Thomas Schnepfer, who is present with counsel.

10 JUDGE GILLMOR: Good morning.

11 JUDGE KAY: Well, on that point, I want to get
12 Mr. Schnepfer's agreement to have Ms. Tower represent you
13 temporarily at this hearing.

14 DEFENDANT SCHNEPPER: Yes, Your Honor, I do agree.

15 JUDGE KAY: That's agreeable with you?

16 DEFENDANT SCHNEPPER: Yes, it is.

17 JUDGE KAY: All right, the court appoints Ms. Tower
18 as temporary counsel for purposes of this hearing.

19 MS. TOWER: Thank you, Your Honor.

20 JUDGE GILLMOR: Could I ask you, Ms. Byrne, to take
21 that microphone and pull it toward you, and pull it up.

22 Go ahead.

23 MS. BYRNE: Yes, Your Honor. Good morning.

24 Pamela Byrne is present for Danielle Ishimura. Her
25 presence is waived; her child is ill today.

1 JUDGE GILLMOR: Very well, good morning.

2 Okay, before we begin -- the defendants may be
3 seated but I want to check with counsel about timing. Now, I
4 have a suggestion, and I would like to know whether or not
5 it's agreeable, or, if you have a different suggestion, I
6 would suggest that the government speak for 20 minutes, and
7 the total of the defense be 30 minutes. And, if that's
8 agreeable to counsel, then we'll check with the defendants.

9 Would you move that mike up, please.

10 MR. ROTKEY: Yes, I apologize, Your Honor.

11 We don't have any objection to the protocol,
12 subject, of course, to -- if there is extensive questioning
13 that may run over, we might ask the court to indulge us for a
14 few more minutes, but we have no objection.

15 JUDGE GILLMOR: Certainly. And I would expect, if
16 there is anything like that, you would ask for more, but I
17 just want to set some ground rules.

18 Mr. Wolff?

19 MR. WOLFF: I think that's fine, Your Honor,
20 although I don't actually anticipate having 30 minutes' worth
21 of remarks. And the other --

22 JUDGE GILLMOR: Well, I am talking total.

23 MR. WOLFF: But the other counsel, basically, have
24 told me they want to defer to my argument and don't anticipate
25 that they would have much, if anything, to say. But if there

1 were questions, of course, that were pertinent to a particular
2 defendant that weren't universal to all four, then I would ask
3 that the court address those questions to the person that's
4 likely to know about it.

5 JUDGE GILLMOR: Very well.

6 MR. PARTINGTON: That's correct, Your Honor.

7 JUDGE GILLMOR: Ms. Tower?

8 MS. TOWER: That's correct, Your Honor.

9 MS. BYRNE: Yes, Your Honor, we agree.

10 JUDGE GILLMOR: And the defendants are in agreement
11 with this policy?

12 DEFENDANT SCHNEPPER: Yes.

13 JUDGE GILLMOR: Mr. Schnepfer has said yes.

14 (Discussion off the record between Mr. Partington
15 and defendant Lee, through the interpreter.)

16 JUDGE GILLMOR: And, Mr. Wolff, your client is in
17 the audience?

18 MR. WOLFF: Yes, and he's acknowledged that that's
19 fine with him.

20 JUDGE GILLMOR: Okay.

21 MR. WOLFF: Nonverbally.

22 JUDGE MOLLWAY: Mr. Lee, is that all right with you
23 in terms of the schedule?

24 JUDGE GILLMOR: If the interpreter would rise and
25 speak.

1 THE INTERPRETER: Yes, thank you.

2 JUDGE GILLMOR: Okay.

3 And I would ask that you use the lectern.

4 MR. ROTKEY: Yes.

5 JUDGE GILLMOR: Thank you.

6 (Discussion off the record between counsel.)

7 MR. ROTKEY: I will defer to you; it's your motion.

8 MR. WOLFF: All right.

9 Good morning.

10 The question that's presented in this case is
11 whether there's really any limit to what Congress can do in
12 setting sentencing policy, or in directing that sentencing
13 policy for the country be handled by a commission. And it
14 seems to me, and our argument is, that there is a limit, and
15 the Congress has passed the limit with the enactment of the
16 Protect Act.

17 Now, of course, a question similar to this question
18 was decided in Mistretta when the guidelines were first
19 enacted, and so I think we would have to acknowledge that, if
20 this case -- or if the current situation after the Protect Act
21 is undistinguishable from Mistretta, then we lose. But I
22 think that, and our argument is, that the situation has really
23 changed quite a bit since Mistretta was decided. And the
24 Protect Act is what changed it. And so the question, then,
25 for this court, is -- and for the judiciary as a whole -- is,

1 who will protect the judicial power, who will say that the
2 Congress or the executive has gone too far, has encroached,
3 has interfered, if the court itself won't? And the answer is,
4 and the Protect Act demonstrates this, as well, that nobody
5 will.

6 So, it's -- in a way, it could be viewed as --
7 although maybe this is making too much out of it -- sort of a
8 "defining moment" in the history of the judicial power in this
9 country, because if, as the government argues, the Congress
10 can do anything, in terms of deferring questions of what's the
11 proper policy for sentencing to a commission, as long as they
12 do it in pieces, and as long as they don't threaten the judges
13 who exercise the judicial power of the country, as
14 individuals, with reduction of their compensation, or with
15 impeachment, then it seems that the government's argument is
16 that anything could be done. Because, if what's been done in
17 the Protect Act could be done, there's no reason why the next
18 act couldn't do some more, and the one after that couldn't do
19 some more.

20 And, so, while I'm not really making a slippery
21 slope argument, what I am saying is that -- is that, at some
22 point, even with Mistretta being the law of the land, there
23 has to come a point at which interference with the judicial
24 power to render a judgment in a case has to be acknowledged as
25 an interference.

1 And the particular vice that is presented by the
2 scheme that the guidelines, post-Protect Act, deal with is
3 that -- and the reason I am saying this is because there can't
4 be any doubt that the Congress could enact mandatory
5 sentences, at least no current doubt under the constitution.
6 So, the question is, you have a guidelines commission which
7 does something very similar: It sets minimum guidelines, it
8 sets maximum guidelines, it tells courts what evidence they
9 consider, what evidence they may not consider, what kind of
10 things they can do, what kind of things they cannot do. And
11 so what was seen in Mistretta as okay because it was just a
12 fettering of previous existing judicial discretion at some
13 point has to be taking away the judicial power to appoint
14 where the court is no longer, in determining a sentence,
15 rendering its judgment.

16 The notion of judicial power being exercised by the
17 judges of the country, as individuals, is, I think, the proper
18 view of what goes on in the judicial process. But when that
19 is circumscribed, and how the court must consider something,
20 and what it must consider, and what it may not consider is
21 narrowed, there is an infringement on judicial power. And,
22 particularly, what has happened here is that Congress, not
23 wanting to do this itself, has deferred it to a commission.
24 And the commission, I think, at this point, given the
25 direction of the Protect Act, can only be properly

1 characterized as a legislative commission. And, as we know, a
2 legislative commission, that is to say a commission that
3 prescribes laws, conducts the investigation, tells what the
4 policy's going to be, that's a problem. It's a problem
5 because the constitution requires that Congress enact laws in
6 a particular way, and in a particular procedural fashion, and
7 they can't do something that is inconsistent with that.

8 And, so, really, what it comes down to, in terms of
9 the way the guidelines have been changed, is that the very
10 vice that Justice Scalia identified in his dissenting opinion
11 in *Mistretta*, has come to pass; that the Congress has changed
12 its mind about what happened with the guidelines in the years
13 since they were enacted and has directed the commission to
14 change the law in accordance with their general wishes. But
15 they are not willing to enact the law, themselves.

16 And I think, also, there's some doubt about whether
17 they could actually do it if they enacted it directly, because
18 while we have a situation where it seems like you could say,
19 well -- and they've done this -- Congress sets the maximum
20 penalties, they set the minimum penalties; it's not at all
21 clear to me that Congress, by enacting a law directly, could
22 do what the commission has been directed to do. In other
23 words, that Congress could tell a judge, or all the judges of
24 the country, this evidence, this type of evidence, is
25 irrelevant in sentencing. Or, this type of evidence is

1 irrelevant in sentencing in a particular category of cases.

2 But yet that is what they've done.

3 The other thing that the Protect Act did is that it
4 enacted a set of reporting requirements and changed various
5 standards of review, and we suggest that that is also an
6 interference with the judicial branch that ought to be
7 recognized as a violation of the doctrine of separation of
8 powers. And I think it's those provisions which are in force
9 which aren't deferred, and as to which the legislature intends
10 that they apply to all cases post-Protect Act that answer any
11 questions that might exist about, well, how does the Protect
12 Act affect your client if his offense -- my client -- if his
13 offense took place before the Protect Act was passed, before
14 the legislation became law. Those aspects of the Protect Act
15 went into effect and are intended, by their language, to apply
16 to all cases that would come before the court post April of
17 this year, whenever the exact date was the legislation passed.

18 So, it's really the case that we confront here a
19 question about whether there's any limit to what Congress can
20 do. And there must be some limit; otherwise, there's no
21 content to the notion of separation of powers, and it's for
22 this court to say whether the limit has been breached. And I
23 suggest that it has.

24 Now, I would be happy to answer questions, or maybe
25 to save whatever time is available to answer Mr. Rotkey's

1 arguments when he makes them, but I think that we have set
2 forth our arguments in our papers, and so, unless there are
3 questions, I would be prepared to sit down for now.

4 JUDGE GILLMOR: Judge Kay? Or Judge Mollway?

5 JUDGE MOLLWAY: Not right now.

6 MR. WOLFF: All right.

7 JUDGE KAY: Well, I'll ask one question:

8 Justice Scalia did write a very strong dissent in
9 Mistretta, but he was the lone dissenter.

10 MR. WOLFF: Yes.

11 JUDGE KAY: And, while Title IV imposes further
12 constraints, and some might say onerous tasks on the
13 judiciary, isn't it fair to say that these new constraints
14 still fall within the confines of Mistretta? Or where would
15 you say they fall outside?

16 MR. WOLFF: Well, I think they fall outside when
17 you -- they fall outside for -- maybe for two reasons:

18 One is that, what we had when Mistretta was decided
19 was a direction from the Congress to the commission to study
20 the sentencing history and practice of the country and to
21 formulate guidelines that were designed to create national
22 uniformity, or at least to significantly reduce what was
23 viewed as unwarranted disparity between similarly situated
24 defendants.

25 And as I think we demonstrated in our reply

1 memorandum, it was anticipated by the Congress that there
2 would be -- at least the Congress that drafted that
3 legislation -- that there would be a significant number of
4 departures. One that was consistent was the practice of the
5 parole commission, the one that was consistent with the
6 practice in Minnesota, which had a guideline system similar to
7 what was envisioned for the United States.

8 Then, what we have with the Protect Act, and what's
9 changed -- so what you had was an attempt -- we could debate
10 whether it was successful or not -- but an attempt to apply
11 national standards to the country as a whole, based on
12 historical practices, and based upon the policy judgments made
13 by the Sentencing Commission.

14 But with the Protect Act, we have something, I
15 suggest, quite a bit different, because what the Protect Act
16 directs the commission to do is to change things by
17 significantly curtailing the number of departures, by going
18 through a process that will result in far fewer departures,
19 and that will result in no departures on certain grounds, in
20 certain kinds of cases, and which direct the courts of the
21 country to either refuse to consider certain types of evidence
22 in certain kinds of cases, or to have to consider certain
23 kinds of evidence in certain kinds of cases.

24 And one example would be the third point for
25 acceptance of responsibility, which, up until recently, was a

1 judicial judgment about whether the defendant had done what
2 the guidelines required in order to earn that point. Now the
3 court has -- it's hard to tell whether the court has any role
4 in the third point. The court can't award the third point
5 unless the government moves for it.

6 JUDGE KAY: Well, as far as your client goes, won't
7 the ex-post facto provision bar the application of --

8 MR. WOLFF: I think so. Although I think, if I am
9 not mistaken in this case, and I know in other cases the
10 government has gone forward and moved for the third point as
11 though they weren't too sure about the ex-post facto issue --
12 or maybe they want to cover their bases, or whatever.

13 And so, to try to get back to the question, Congress
14 has made a policy decision that there's been too many
15 departures, and they want there to be less. And so they have
16 directed the commission to change the sentencing policy of the
17 United States. But I think that the vice in that is that they
18 basically want the Sentencing Commission to legislate. And
19 that's why we argue that this is a -- has become a legislative
20 commission, and legislation has to be enacted in a particular
21 way; it can't be enacted by a commission, no matter how
22 convenient that it might be that it do so.

23 JUDGE MOLLWAY: But, following up on Judge Kay's
24 comment, why do we have to go so far as to sentence without
25 reference to the sentencing guidelines, as opposed to using

1 the pre-Protect Act law for clients whose cases were already
2 ongoing at the time the Protect Act was passed? So the
3 ex-post facto issue that Judge Kay mentioned, why do we have
4 to go to the full extent that your motion seeks?

5 MR. WOLFF: Well, I think the reason is because it's
6 important to draw a line to protect judicial --

7 JUDGE MOLLWAY: Right. But I guess this goes to
8 standing. It may be that a case that's post-Protect Act would
9 be the proper case in which to examine whether that line had
10 been crossed, but with your client and those others who are
11 here, since they were pre-Protect Act, this might be decided
12 only on an ex-post facto basis, which would not invalidate the
13 application of the guidelines, but only use the pre-Protect
14 Act guidelines.

15 MR. WOLFF: Well, that would -- I mean, that would
16 be an approach; but, the reporting requirements in the
17 direction of the Department of Justice to report to the
18 Congress the sentencing data, including the names of judges,
19 and so forth --

20 JUDGE MOLLWAY: Even if we were to say that that was
21 not appropriate, possibly that's also an ex-post facto issue,
22 that, certainly, judges shouldn't have to have all this stuff
23 reported on them on matters that were already in the pipeline,
24 and which they were handling before the Protect Act even
25 kicked in. I don't know, but that's a possible way to do it

1 and not go the full nine yards in this case, but reserve that
2 issue for some post-Protect Act case.

3 MR. WOLFF: Right. And we have asked for that
4 relief as an alternative, although, obviously, we would prefer
5 the -- well, we would prefer any ruling that was in our favor,
6 but the more expansive the better...

7 (Laughter in the court.)

8 MR. WOLFF: I'm sure that won't be news to the
9 court.

10 (Laughter in the court.)

11 JUDGE KAY: Wouldn't it be fair to say that the
12 imposition on the judiciary of Title IV is a much lesser
13 imposition than the imposition of the guidelines which was
14 approved by the Supreme Court.

15 MR. WOLFF: Well --

16 JUDGE KAY: Is this the straw that breaks the
17 camel's back?

18 MR. WOLFF: Well, if it isn't the straw that breaks
19 the camel's back then there'll be no straw ever that breaks
20 the camel's back. In other words, if the government's
21 argument is admitted here and prevails, then there's really no
22 limit that I can see, no principal upon which some court in
23 the future could say, well, now you've gone too far. Because,
24 what would it be? I suppose if they passed -- if they
25 directed the commission to single out by name a defendant, or

1 to identify post indictment but before sentencing a class of
2 defendants and pass guidelines that apply to that defendant by
3 name, you know, you could say, okay, we have gone too far.
4 But, barring something like that, it's not clear to me that
5 there would be anything -- if this is okay -- that would not
6 be okay. Because, here, the Protect Act directs that certain
7 kinds of information that had traditionally and under the
8 guidelines been relevant to departures, like family ties and
9 community service and those things, even though they might be
10 discouraged departures, they were still available in
11 extraordinary cases, those have been eliminated for a
12 particular class of cases.

13 And what would stop the Congress from directing the
14 commission next time to eliminate those considerations in
15 another class of cases? And then a class after that? Or to
16 tell the court that, if the defendant is going to have a
17 departure, he must prove his evidence up by a standard beyond
18 a reasonable doubt, but if the government wants an upward
19 departure they can prove it by a preponderance of the
20 evidence. Or anything like this. It doesn't seem to be
21 there's any limiting principle that this is okay.

22 And I go back to what Mistretta did -- or what the
23 guidelines did that Mistretta approved, which was to deal with
24 what the Congress identified as a problem; namely, the
25 disparate sentencing across the country. But now, having

1 accomplished that, and having ended up with a system that
2 was -- at least as far as I'm concerned -- working in
3 accordance with the original framers' intent, in terms of
4 departures, they decided to change national sentencing policy,
5 and to do it by indirect legislation through what we contend
6 now is a legislative commission.

7 JUDGE KAY: Now promoted from the junior varsity to
8 the varsity --

9 MR. WOLFF: It's a senior varsity commission because
10 these troubling issues are hard to deal with. And it's easier
11 to put it in front of a commission of people with no
12 constituents, less well known, and there's no one then to
13 blame. The individual congressman who votes to enact a
14 particular guideline that causes harsh result in a particular
15 case might get some feedback from one or more of the people
16 who live in his or her district. But when you put it off to a
17 commission, it's just another relatively more or less
18 anonymous bureaucracy that is enacting the legislation. And I
19 think that, because of what Article One says in the
20 constitution, about how legislation has to be enacted, that's
21 a problem.

22 JUDGE GILLMOR: Any other questions?

23 (No response.)

24 JUDGE GILLMOR: Thank you, Mr. Wolff.

25 Mr. Partington?

1 MR. PARTINGTON: No, I join in what Mr. Wolff had to
2 say.

3 JUDGE GILLMOR: Ms. Tower?

4 MS. TOWER: I join in what Mr. Wolff had to say.

5 JUDGE GILLMOR: Ms. Byrne?

6 MS. BYRNE: Yes, we have nothing to add at this
7 time; thank you.

8 JUDGE GILLMOR: Thank you.

9 The government, please.

10 MR. ROTKEY: Thank you, Your Honors, and, may it
11 please the court, counsel, again, my name is Michael Rotkey.
12 I am an attorney for the appellate section of the criminal
13 division of the United States Department of Justice in
14 Washington, D.C. I represent the United States in these four
15 cases, in connection with these pending motions. And, at the
16 outset, I want to thank the court for accommodating our
17 request for this consolidated proceeding here this morning.

18 Your Honors, the defendants' motion in this case
19 raised a number of issues and supposed concerns based upon the
20 provisions of Title Four of the Protect Act.

21 In our brief in response, what we tried to do was to
22 go through and analyze the specific statutory provisions that
23 the defendants have cited, and to try to explain that
24 notwithstanding their failure to acknowledge the legitimate
25 purposes that are being served here, none of these provisions

1 transgresses any constitutional limitation imposed on the
2 Congress or the executive branch.

3 Neither in their reply brief or again here this
4 morning do we have any specific focus that is being made by
5 the defendants on what is the statutory provision that
6 allegedly violates the constitutional principle of judicial
7 independence that is being invoked. We have a lot of broad
8 discussion about junior varsity commissions and delegations,
9 and we don't like these things, and Congress has exceeded the
10 limits, but with all due respect, it's not enough to just make
11 the conclusion, we have to look at what allegedly caused there
12 to be this constitutional violation. What provision in the
13 statute runs afoul of the constitution -- the constitutional
14 principle that's at issue?

15 And what we have submitted, Your Honor, in our
16 brief, after going through each particular provision of the
17 statutes that the defendants have cited, is that none of them
18 comes even close to transgressing the broad constitutional
19 limit of judicial independence on Article Three judicial
20 independence. And, therefore, we think that Congress acted
21 well within its authority in adopting the reforms that it did
22 here, and that there is no basis upon which to declare -- for
23 the extraordinary act of declaring a federal statute
24 unconstitutional.

25 Now, what I would like to do in the time that's been

1 allotted is to just discuss some of the particular provisions
2 at issue. And before that, I would like to just begin with a
3 kind of brief overview here.

4 Prior to 1984, Your Honors, federal judges enjoyed
5 virtually unfettered discretion at sentencing; however,
6 predictably, the exercise of such broad discretion led to wide
7 disparity in the sentences that were imposed on similarly
8 situated offenders. And in the landmark Sentencing Reform Act
9 of 1984, Congress sought to minimize, if not eliminate, these
10 disparities and to achieve certain goals. And those goals
11 were to bring consistency, fairness and predictability to
12 federal sentencing practices. And that was the objectives
13 that Congress sought to achieve.

14 To bring about those objectives, the Sentencing
15 Reform Act of 1984 created a multi-member independent agency
16 within the judicial branch, known as the United States
17 Sentencing Commission, and directed the commission to
18 promulgate what are known as the sentencing guidelines.

19 And, as the court well knows, Congress directed that
20 those guidelines establish presumptive sentencing ranges based
21 on offense and offender-specific characteristics. But yet it
22 reserved to the court the power to depart from those ranges in
23 truly exceptional or extraordinary cases.

24 Now, despite Congress' efforts and intentions,
25 Your Honors, inequity still persisted under the new guidelines

1 regime, this time owing in large part to the excessive
2 reliance on the number of departures that were being imposed.

3 And, so, earlier this year, just as it had in 1984,
4 the Congress adopted legislation designed to address this
5 seemingly intractable problem of unwanted sentencing
6 disparity. And the question is whether, in adopting the
7 provisions of Title Four of the Protect Act, Congress
8 transgressed the constitutional principle by impermissibly
9 interfering with the independence of the federal judiciary.

10 In our view, Your Honor, the answer is, no. And
11 what I would like to now do is turn to a discussion of certain
12 of the statutes, or the provisions that have been referenced
13 here this morning. But, before I do so, I think it's
14 important to just point out the general background principles
15 that I think should inform and guide this court as it
16 considers these questions.

17 And the first principle, Your Honor, is that
18 statutes are presumed to be constitutional. That, due respect
19 for our elected representatives requires that we begin from
20 the promise that these statutes are legitimate exercises of
21 authority.

22 And the second principle, which is related,
23 Your Honor, is that courts have a duty to construe statutes in
24 a manner that preserves and uphold their constitutionality.
25 And I say this, Your Honor, because, in our view, the

1 defendants have fundamentally turned those principles on their
2 head. Because they begin from the starting point that this is
3 some kind of mean-spirited legislation that was designed, in
4 their words, Your Honors, to threaten and intimidate the
5 federal judiciary in the performance of their official duties.

6 We think that's not the case and that's not the
7 appropriate starting point. And as we pointed out in our
8 brief, we believe that each of the provisions of the statute
9 cited by the defendants can -- does serve a number of
10 legitimate justifications. It's not designed to intimidate
11 the judiciary, and we shouldn't start from that premise.

12 I guess the main provision that I would like to
13 focus on, which was discussed which Mr. Wolff, is the
14 so-called reporting requirements. These provisions are found
15 in Section 401(L) of the Protect Act and the Attorney
16 General's memorandum from July of this year, which implements
17 that provision.

18 Now, as a prefatory note, Your Honor, much has been
19 written and much has been said about the Protect Act in the
20 press and elsewhere. And the pleadings submitted by the
21 defendants make reference to a number of news articles that
22 discuss both the Protect Act in general, but also these
23 particular reporting requirements.

24 With all due respect, Your Honors, the government's
25 position is that there are a number of misconceptions and

1 inaccuracies that have been engendered about the purpose,
2 effect and operation of these provisions. And what I would
3 like to try to do in some of the time that's been given to me
4 this morning is to try to clear the air about some of these
5 misconceptions, and to use the colloquial, to set the record
6 straight.

7 Your Honors, the United States Attorney's manual,
8 which is an internal executive branch policy guide book, has
9 long imposed upon federal prosecutors the duty -- federal
10 prosecutors throughout the country, be it in the U.S.
11 Attorney's Office in Hawaii or Alaska or Florida, it has long
12 imposed upon those offices a duty to report -- and that is
13 simply another word for "notify" -- the Department of Justice
14 in Washington, D.C., where I work, and particularly in the
15 appellate section of the criminal division, of all adverse
16 decisions that are rendered, that are contrary to the
17 government's position. And that can be a motion to suppress
18 that is granted; it can be the granting of a judgment of
19 acquittal. Whatever the issue is, there has long been a
20 requirement to notify, report, those facts to the Department
21 of Justice.

22 And those reporting obligations --
23 (incomprehensible) in the U.S. Attorney's manual, flow from
24 the fact that the government occupies a very unique status,
25 because, unlike a particular judge or a particular defendant,

1 the government is a party to every federal criminal
2 proceeding. And, as a result of that unique status,
3 Your Honor, there are certain obligations that are imposed on
4 the government, and certain restrictions that are imposed on
5 the government.

6 And what these reporting or notification
7 requirements do is, they further legitimate institutional
8 interests that are unique, or particular, to the executive
9 branch.

10 The first interest that is served is, it makes sure
11 that the government is taking consistent litigating positions
12 throughout the country. We don't want federal prosecutors in
13 Hawaii to take a position on the interpretation of a
14 statute --

15 JUDGE GILLMOR: Could you slow down a little bit.
16 The court reporter has to write this down, and you are
17 gathering steam here...

18 MR. ROTKEY: I apologize. I actually warned the
19 court reporter that my New Yorker in me -- sometimes I get
20 ahead. I apologize.

21 The -- I'm sorry, Your Honor, I lost my train of
22 thought... it serves a number of important interests. The
23 first is to ensure consistency of litigating positions. But
24 the second point, which I think is perhaps most important, is
25 that it serves to keep the solicitor general of the United

1 States apprised as to trends and developments and
2 interpretations of the law throughout the United States. And
3 the reason that is significant, Your Honors, is that, by
4 regulation, the solicitor general is the Attorney General's
5 designee, who is in charge of supervising and managing all
6 appellate litigation throughout the United States.

7 A federal prosecutor, be it in Hawaii, Florida, or
8 elsewhere, has no authority, or no ability to appeal an
9 adverse ruling that he disagrees with, on his own. It is only
10 when the solicitor general gives explicit written
11 authorization that such an appeal may be taken. And that is
12 designed to centralize the process, Your Honors.

13 Now, why do I say all -- well, let me make one other
14 remark here, and that is, adverse decisions, such as motions
15 to suppress, are one thing, but under the pre-Protect Act
16 version of the United States Attorney's manual, sentencing
17 guidelines decisions did not need to be reported -- or
18 notified to the Department of Justice. And the reason for
19 that, Your Honors, is simply a practical one: We would be
20 inundated with paperwork if we were required to be notified
21 every time a court granted one point or didn't grant one point
22 that we thought, in terms of calculating the offense level.

23 It was only if the prosecutor wanted to appeal that
24 decision under the guidelines that notice was required,
25 because, again, the solicitor general would need to approve

1 that request.

2 With regard to adverse departure decisions, I can
3 say and represent that federal prosecutors rarely sought
4 authorization to appeal those kinds of decisions. And that
5 was largely due to the Coon decision, which imposed a highly
6 deferential abuse of discretion standard. And, as a result,
7 it was very difficult to prove reversible error in connection
8 with the departure.

9 Now, what the Protect Act does, Your Honor -- and I
10 apologize for the length of the background, but I think it's
11 important -- what the Protect Act does is, it seeks to impose,
12 in Section 401(l) more vigorous notification requirements
13 concerning adverse departure decisions; that is, downward
14 departures. And what the Attorney General has done, pursuant
15 to the statutory authority, is to adopt objective criteria
16 which now -- under which now federal prosecutors, if those
17 criteria are satisfied, they have an affirmative duty to
18 notify the Department of Justice as to that adverse ruling.
19 It does not guarantee that an appeal will be taken. And it
20 certainly does not, contrary to the analogy that's been
21 suggested by the defendants, it certainly does not give the
22 Attorney General the power to veto a sentence; it doesn't give
23 the Attorney General the power to revise a sentence. This is
24 pure and simply an intraexecutive branch notification
25 requirement designed to enable the solicitor general to make

1 informed decisions.

2 And, so, the first point that I wanted to make,
3 Your Honors, is that it really is, with all due respect, it's
4 a misconception to view or to treat these reporting or
5 notification requirements as some new directive by the
6 Attorney General, and certainly to view it as a tool of
7 intimidation. That is not the point. And, again, consistent
8 with my earlier remarks, we should not be so quick to presume
9 that to be the case. These provisions serve legitimate
10 institutional interests of the executive branch.

11 And the second point, and perhaps what is most
12 salient to our discussion here today, is that nothing, nothing
13 in the statute or the attorney general's memorandum, in any
14 way gives the executive branch or the Congress any
15 impermissible coercive control or influence over the decisions
16 made by life-tenured and salary-protected Article Three judges
17 in connection with sentencing.

18 As I said before, the executive, by virtue of these
19 reporting changes, has no power to revise a sentence or to
20 conduct review of a sentence. At most, these provisions are
21 designed to encourage the executive to seek judicial review of
22 a sentence that it disagrees with. And so any veto of a
23 sentencing departure decision comes from within the Article
24 Three hierarchy. It doesn't give the executive the power to
25 decree the sentence.

1 And, similarly, the suggestion that Congress somehow
2 has the power to intimidate judges, or to decree what a
3 sentence should be, there's nothing in the statute that
4 supports such a construction. And, again, the whole idea
5 behind the framers' vision, behind the genius of their vision,
6 the whole reason that Your Honors have been endowed with life
7 tenure and salary protection, is precisely so that you would
8 be immunized from political pressures at the hands of
9 Congress. In short, there is nothing that Congress can do
10 against an individual Article Three judge because it may
11 disagree with your decision, whether it's to depart or
12 otherwise. There's no action that can be taken. That's why
13 you have life tenure.

14 Theoretically, yes, the constitution does permit for
15 impeachment of a federal judge, Your Honors, but, as we
16 pointed out, that power cannot be exercised to retaliate
17 against a judge for his or her official acts in office. Yes,
18 it can be exercised if a judge evades his taxes or accepts a
19 bribe, because those are unrelated to the exercise of judicial
20 power, but there's no action that can be taken simply because
21 Congress thinks that a judge is departing in ways with which
22 it disagrees as a matter of policy. That's the way the system
23 works. If Congress doesn't like it, the way to resolve it is
24 exactly what Congress did here, in Title Four: It's through
25 the legislative process. And that's what Congress did. But

1 the suggestion that there's some -- these reporting
2 requirements are kind of mean spirited, or that they somehow
3 transgress judicial independence -- and there's no support for
4 that. There's none --

5 JUDGE KAY: Well, one point that has been raised is
6 that it might discourage and intimidate younger judges in
7 their decisions if they have aspirations of being elevated to
8 a higher court and have to be approved by the Senate judiciary
9 committee.

10 MR. ROTKEY: Well, Your Honor, with all due respect,
11 that's kind of a hypothetical scenario. Is it a real one? I
12 guess... maybe -- but that, to me, seems so far removed and so
13 attenuated that, I mean, to think about it, to say that
14 because of the possibility that an Article Three judge may
15 have aspirations to be appointed to the court of Appeals, I
16 mean, the Senate judiciary committee is going to scrutinize
17 decisions independent of whether or not the executive decides
18 to appeal them or not.

19 It seems to me -- I would certainly defer to
20 Your Honors about the workings of the Senate judiciary
21 committee process, but it seems to me that decisions are going
22 to come under a microscope regardless, and that whether or not
23 the executive chooses to appeal that decision -- there's no
24 way to know. And there's no way to say that that's kind of
25 the causal factor, or that there's going to be some

1 intimidation, or that judges should refrain from exercising
2 their judicial power because of this potential consideration
3 that may or may not ever manifest itself.

4 Again, I have to defer to Your Honors about the
5 judicial -- about the confirmation process, but -- a similar
6 issue was dealt with in *Mistretta*, and the Supreme Court found
7 no constitutional infirmity there. I'm not quite recalling
8 exactly what it was, but I know that there was a specific
9 discussion about judges perhaps wanting to curry favor with
10 the president in order to secure a nomination to the
11 Sentencing Commission.

12 And similar arguments were raised and rejected in
13 *Mistretta*, and I would just cite that as support.

14 But, again, what it ultimately comes back to is that
15 regardless of aspirations, Your Honor, you have life tenure,
16 you have salary protection, and there are very good
17 fundamental, sound reasons that the framers gave you those
18 protections. And that is so that you would be insulated from
19 political pressures, in terms of being threatened or
20 intimidated. And that would be our position as to that point,
21 Your Honors.

22 I don't know if the court -- again, my main focus
23 here was to try to address these reporting requirements and
24 show that there's really nothing sinister about them; that
25 they are really part of a long-standing executive branch

1 practice.

2 I guess the one other observation I would just make
3 concerning those requirements, Your Honors, is that I think
4 there's an irony here, and the irony would be, what we are
5 dealing with is whether Congress somehow violated the
6 separation of powers. And yet I think for the court, with all
7 due respect, for the court to say that the executive branch's
8 own internal decision-making process about what kinds of
9 decisions should and should be (sic) reported to the Justice
10 Department -- not appealed, just notified or reported -- for a
11 court to say that the executive may not make decisions about
12 which kinds of cases, what kinds of criteria should gauge the
13 reporting, I think that, in and of itself, would raise
14 interesting separation of powers problems. I think that that
15 get to a more fundamental question about whether the judiciary
16 can tell the executive how to structure its own affairs.

17 It's not a question that's presented, but I think
18 it's something to keep in mind. And I noticed it -- as I was
19 thinking about the case -- that there is kind of an irony
20 there. Because these are internal -- internal executive
21 branch notification provisions. And I think the executive is
22 entitled to make those kind of judgments to enable the
23 solicitor general to make informed decisions about what kinds
24 of cases merit an appeal.

25 I am fully prepared here this morning to address any

1 of the other statutory provisions that the defendants have
2 cited in their brief, and I would be happy to answer any
3 questions. I don't know if I have exceeded my time, but I
4 would defer to the court in terms of how it would like me to
5 proceed at this juncture. I have come a long way, and I am
6 happy to spend my time as would best be suited.

7 JUDGE MOLLWAY: Let me ask about the government's
8 position on the ex-post facto issue.

9 MR. ROTKEY: Uh-huh?

10 JUDGE MOLLWAY: In your brief, you suggest that the
11 defendants really are worried about nothing because --

12 MR. ROTKEY: I think -- if I recall, Your Honor --
13 not to interrupt you, I apologize --

14 JUDGE MOLLWAY: Go ahead.

15 MR. ROTKEY: A lot of what we heard -- and I
16 appreciate Your Honor's question -- a lot of what we heard
17 this morning is, if this practice is upheld, then what's next?
18 And then what's next after that? And, again, with all due
19 respect, we have to focus on what's before us today, not
20 hypothetical questions about what might happen in the future
21 if Congress decided to do other things.

22 And, with regard to the ex-post facto provisions,
23 Your Honor, there may well be -- that was raised, as
24 Your Honor, Judge Mollway, noted, in connection with some
25 standing arguments that we have advanced about why certain of

1 the claims are not really properly before the court at this
2 time. And, in particular, the defendants have challenged
3 Sections 401(a) and (b), which curtailed the district court's
4 discretion to depart on certain grounds. It doesn't eliminate
5 your discretion to depart, it just curtails it on certain
6 grounds in the approximately two percent of cases that involve
7 child abuse or sex offense crimes.

8 And the defendants have raised a constitutional
9 challenge to this curtailment of discretion. And one of the
10 arguments that we have made, Your Honors, is that there really
11 is no standing to consider these claims. And there is an ex-
12 post facto reason here:

13 First of all, three of the four defendants now
14 before the court in these consolidated cases have been
15 convicted of crimes other than child abuse or sex offense.
16 The only defendant who has been convicted of a qualifying
17 predicate is Mr. Schnepfer. But yet, as to him, Your Honor,
18 the ex-post facto clause would probably -- and my
19 understanding is, the government's position has not been
20 represented in writing formally -- it will be -- that there is
21 an ex-post facto clause limitation, and that these -- the
22 curtailment of these departure grounds, as applied to
23 Mr. Schnepfer, can't be reconciled with the ex-post facto
24 clause. And, so, as a result, the question of whether these
25 provisions are generally unconstitutional, it's not posed,

1 because none of these defendants has standing to argue about
2 them; none is aggrieved by these particular provisions.

3 JUDGE MOLLWAY: But some of the provisions, the
4 government's position is, do apply --

5 MR. ROTKEY: Yes.

6 JUDGE MOLLWAY: -- to all cases, including cases in
7 the pipeline pre-Protect Act. And one of those is the
8 reporting requirement.

9 MR. ROTKEY: Yes, that's correct. And that has long
10 existed. The reporting requirement has long been on the
11 books; this is just a modification. Effectively -- and one
12 other point I meant to make about the reporting requirements:
13 All it really does is, it takes a certain class of cases for
14 which notice had been discretionary. It had been up to the
15 U.S. Attorney whether they wanted to appeal. And it now makes
16 it mandatory. That's the twist. That's the novelty of these
17 reporting requirements. But the notion of the reporting
18 requirements themselves are new is not correct. The Protect
19 Act preserves and perpetuates but amends those reporting
20 requirements in furtherance of the objectives of Title Four.

21 And the reason that we believe that the majority of
22 these provisions should be applied is because that's what the
23 Supreme Court tells us, is that we ordinarily apply the law in
24 effect on the date of a crime. Now, there may be ex-post
25 facto constraints, but I don't believe that the defendants

1 generally have argued that there would be some ex-post facto
2 problem in -- for example, the provisions -- I am trying to
3 think... there are provisions regarding the documents that the
4 court is obliged to provide to the Sentencing Commission. I
5 don't see where there's an ex-post facto problem there. The
6 defendants have challenged the written statement of reasons
7 that a court must give now when it departs -- on a prospective
8 basis. I don't see where there's any application to these
9 defendants or any ex-post facto problem there.

10 There may be a connection with the standing argument
11 in the application of specific changes that are made, if they
12 are disadvantageous, in cases that were already in the
13 pipeline, but I don't think, more generally, there's any -- I
14 think we do apply the law in effect at the time. And the
15 Protect Act is the law that is in effect now and should be
16 applied.

17 JUDGE GILLMOR: Did you have a question, Judge Kay?

18 JUDGE KAY: No, actually, I was going to ask a
19 question on the ex-post facto.

20 JUDGE GILLMOR: I would like you to answer the issue
21 raised by Mr. Wolff, that Congress couldn't do directly what
22 they are trying to do indirectly, and that is, restrict the
23 court from considering certain types of evidence at
24 sentencing.

25 MR. ROTKEY: I would be happy to, Your Honor.

1 I must say that I am taken a little bit aback; I
2 didn't read any of the defendants' briefs to kind of raise an
3 argument about evidence that can be considered at sentencing.
4 I may be mistaken, but -- let me just say, generally, I think
5 the best response about Congress not being able to do
6 directly... it seems to me -- and Mistretta makes very
7 clear -- that Congress has the power to control the scope of
8 judicial discretion at sentencing. And I think the Supreme
9 Court has repeatedly said that if Congress wanted to, Congress
10 could adopt strict determinant sentencing under which judges
11 would have zero discretion -- no discretion. Congress could
12 say, if you are convicted of armed bank robbery, you get 15
13 years in prison; that's it. And so it seems to me, if
14 Congress can -- and that has been long upheld and repeatedly
15 upheld as a constitutional exercise of Congress' authority.
16 And I cite the Chapman decision of the Supreme Court, from
17 1991, which is in our brief, which is the most recent
18 exposition of that principle.

19 And, so, if we can have strict determinant
20 sentencing, if Congress could have done so, it seems to me
21 there's lots of flexibility, there's lots of room for Congress
22 to have done directly here what it's asked the Sentencing
23 Commission to do. And I think, far from believing that
24 Congress was trying to duck the issue, I think Congress wanted
25 to benefit from the commission's expertise. That's why

1 Congress asked the commission to get involved here, was
2 because the commission is the expert. The commission does
3 have almost 16 years now of accumulated wisdom over how the
4 guidelines are to be implemented. And so I don't see anything
5 impermissible. I don't think Congress is trying to get around
6 anything.

7 And to the extent that this is being -- the two
8 broad issues in Mistretta, Your Honor, the two broad
9 constitutional challenges were a delegation challenge and a
10 separation of powers challenge. And the defendants have
11 focused here today, in their papers at least, on the
12 separation of powers issue. And to the extent now we are
13 talking about, well, this has really now become a delegation
14 issue, that Congress can't delegate this to the commission,
15 first of all, again, I don't believe that a delegation
16 challenge has been raised in the papers; but, again, for the
17 reasons that I have stated, I think this is fully consistent
18 with what Congress can and could not do.

19 We may disagree about the wisdom of Congress asking
20 the commission to get involved here, but that's not -- with
21 all due respect, that's not a matter for judicial cognizance.
22 All we are concerned about here is the Article Three
23 limitations. We are not talking about the wisdom of these
24 policy decisions.

25 Who knows what Congress was doing and why they asked

1 the commission to get involved? I believe it's because of
2 their expertise, but, again, I don't see how that factors into
3 the constitutional analysis. And that's what we are here to
4 focus on, is whether there's been some transgression of the
5 Article Three's limitations.

6 Unless there are further questions...

7 JUDGE GILLMOR: I have a question.

8 MR. ROTKEY: Yes?

9 JUDGE GILLMOR: How do you see the judge's role with
10 respect to the one point that Mr. Wolff mentioned?

11 MR. ROTKEY: A couple of things, Your Honor.

12 Again, I hate to be redundant here, but I don't
13 believe that any of these defendants is affected by the
14 three-point provision, so I'm not sure why it's being raised.
15 I don't think any of these defendants -- I may be mistaken,
16 but I don't believe that that's an issue.

17 But, in any event, the notion on the third point, at
18 most -- again, that would be an ex-post facto consideration --
19 all that would mean is that there's some problem, that if it's
20 going to be disadvantageous, we don't apply it to an
21 individual defendant.

22 JUDGE GILLMOR: Well, I am asking you how you apply
23 it, if it did apply.

24 MR. ROTKEY: Well, the provision says that, now, the
25 third point may not be granted without a government motion.

1 And that is very similar to the procedure that Congress and
2 the commission used in connection with 5(k) motions for
3 substantial assistance, that the court has no power to grant a
4 5(k) departure unless the government first moves for one. And
5 I think that's exactly -- I think Congress probably used that
6 as a template in connection with the third point. But I don't
7 see where that violates --

8 JUDGE GILLMOR: So does the court have any role
9 deciding whether or not the one point is appropriate or not?

10 MR. ROTKEY: I think -- I haven't focused on this,
11 Your Honor, but I would think, by analogy to the 5(k), that it
12 absolutely does. There is an antecedent issue, which is
13 whether the government has moved for the third point. I think
14 if the government doesn't move -- again, drawing on the 5(k)
15 and the Supreme Court's decision in Wade, we normally don't
16 scrutinize the prosecutor's motives for not filing a motion
17 for a 5(k) departure unless there is some unconstitutional
18 motive.

19 So I think you view it as, number one, if the
20 government doesn't move, and there's no unconstitutional
21 motive, then I think that's the end of the matter. And if the
22 government does move, then I think it's up to the court to
23 make a judicial determination whether or not that one point is
24 appropriate based on the timing of the plea, which I believe
25 is one of the considerations. But, again, the mechanics about

1 how we implement the third point, I think -- to say that there
2 may be some provision, some issue about how it's
3 implemented -- I mean, what we are talking about here, let's
4 make no mistake about it, the defendants have asked this court
5 for the most extraordinary relief that a federal court is
6 empowered to give, and that is a declaration of
7 unconstitutionality. And so -- there's a wide gap between
8 saying there may be a problem with the implementation or the
9 mechanics of how you implement one provision and conducting
10 that awesome act of declaring a federal statute
11 unconstitutional across the board. And that's the relief that
12 they have sought. And I think they have come well short of
13 overcoming all the presumptions and all the burdens that they
14 have to deal with to demonstrate how and why there is some
15 requirement -- or some obligation on the part of this court to
16 exercise that awesome authority.

17 And, so, because of those shortcomings, because of
18 the presumptions, and because we think that Title Four is
19 perfectly consistent with Congress' authority, as recognized
20 by the Supreme Court, we ask the court to deny the defendants'
21 motion.

22 JUDGE GILLMOR: Thank you, Mr. Rotkey.

23 MR. ROTKEY: Thank you, Your Honors.

24 JUDGE GILLMOR: Mr. Wolff, did you wish to reply?

25 MR. WOLFF: Briefly, Your Honor.

1 Let me focus first, briefly, on the subsection L
2 that Mr. Rotkey referred to. That's the so-called reporting
3 requirement. And while it is true that the Department of
4 Justice had a reporting requirement before the Protect Act,
5 the latest reporting requirement is a direct response to the
6 Protect Act. And I thought it was somewhat ironic that the
7 government's argument here is that the judiciary can't tell
8 the executive branch, basically, anything about how to
9 structure its internal policies, and yet their internal
10 policies are a direct response to the congressional mandate
11 set forth in Subsection L. So apparently they are quite
12 content to have the Congress do so, and -- all I can say is
13 that we are not so content.

14 That illustrates one of the problems here.

15 And I think the government's argument comes down to
16 this -- and they have almost said it, but they haven't quite
17 said it: There really is nothing that couldn't be done by
18 some other Congress, in terms of directing the Sentencing
19 Commission to do one thing or another, and -- and that's their
20 position.

21 And while it is probably the case that Congress
22 could directly legislate a system of mandatory sentences, when
23 Congress legislates, they are constrained by the exhaustive,
24 finely wrought procedures -- I'm quoting here -- that are set
25 forth in Article One about how legislation is to be enacted.

1 And it doesn't say that you can do that by deferring
2 to a commission -- which has now -- whatever it was at the
3 time of Mistretta, it's now taken on, I would submit, the
4 unmistakable characteristic of a legislative commission.

5 And this, perhaps, is an analogy that illustrates
6 it: If Congress had taken this exact statute and said,
7 instead of deferring to the Sentencing Commission, we're going
8 to defer this to a subcommittee of the judiciary committee,
9 who have great expertise in these matters, and they will write
10 out these guidelines, and they will respond to the directions
11 of the Protect Act, there wouldn't be any doubt, whatsoever,
12 that that was unconstitutional, because the Congress cannot
13 delegate to a subcommittee of itself its legislative power.

14 Here, we submit that -- and as I conceded at the
15 beginning, if this case is indistinguishable now from
16 Mistretta, if the situation now, post-Protect Act, is the same
17 as existed when Mistretta was decided, we lose. But I don't
18 think that's the case. We have an incremental but radical
19 shift in what was going on in 1984, and unless it is curbed
20 when it happens, unless it is recognized for what it is when
21 it happens, there won't be any principal basis on which to
22 say, at some future time, now you have gone too far.

23 So to respond to -- I forget which member of the
24 court it was who talked about the straw that breaks the
25 camel's back. At some point you have to say, if we don't stop

1 an encroachment upon one branch's power by another at a
2 particular point, then we won't have a neutral principle which
3 can guide us at some future date as to what the limit would
4 be.

5 And it's not like pornography, where you recognize
6 it when you see it, in the words of one of the justices from
7 the past; you have to look at institutionally how this whole
8 system works and then make a determination as to whether,
9 institutionally, the Congress has begun to interfere in an
10 unconstitutional way with the power of the judiciary. And we
11 submit that they have done so.

12 And, while it is true that it would be an unusual --
13 I don't know about "extraordinary" -- thing to so hold,
14 somebody has to do it. And that's why I started off saying
15 that it's possible -- I hope I am right about this -- that
16 this is one of those things that, when looked back on from
17 some years down the road, was a defining moment, and did we
18 see as a society what had happened to the judicial power when
19 the Protect Act was enacted? And did we recognize it and do
20 anything about it? Or did we just let it go by and say, we
21 will take it up at a future date and hope that it all works
22 out?

23 Well, I think you know my answer.

24 Thank you.

25 JUDGE GILLMOR: Thank you, Mr. Wolff.

1 Do any of the other defense counsel wish to speak?

2 MR. PARTINGTON: No, Your Honor.

3 MS. TOWER: No, Your Honor.

4 MS. BYRNE: It's tempting, but, no, Your Honor.

5 JUDGE GILLMOR: Thank you.

6 Then, if there is nothing further before the court,
7 at this time we will take the matter under submission. And,
8 thank you.

9 We stand in recess.

10 THE BAILIFF: All rise.

11 Court stands in recess.

12 (The hearing in the above-entitled
13 cause was concluded at 11:11 a.m.)

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I, Stephen B. Platt, Official Court Reporter,
United States District Court, District of Hawaii, do hereby
certify that the foregoing is a true and correct transcript of
proceedings before the Honorable Helen Gillmor, United States
District Judge.

/s/ Stephen B. Platt

MONDAY, APRIL 12, 2004

STEPHEN B. PLATT, CSR NO. 248